

1 defendants. Even if the plaintiff was able to enforce it against
2 the defendants, the plaintiff has not presented evidence that
3 raises a genuine issue that the defendants did not properly
4 terminate the contract.

5 Therefore, the Court grants summary judgment in favor of the
6 defendants on the plaintiff's second claim.

7
8 D. Claim Three: Breach of Implied Covenant

9 The defendants argue that since the plaintiff has no
10 contractual relationship with the defendants, the plaintiff
11 cannot state a claim for breach of the implied covenant of good
12 faith and fair dealing.

13 As discussed above, the plaintiff has not presented any
14 evidence to support finding an underlying contract that was
15 binding on the defendants. Therefore there is no implied
16 covenant and no breach of it.

17 The Court therefore grants summary judgment in favor of the
18 defendants on the plaintiff's third claim.

19
20 E. Claim Four: Breach of Easement Agreement, etc.

21 In order to prevail on its claim for breach of an easement,
22 the plaintiff must first prove the existence of an easement.
23 California law recognizes express easements, implied or quasi
24 easements, and irrevocable licenses that are equivalent to
25 easements.

26 An implied easement arises as a result of land that is
27 originally owned by one individual being divided. An irrevocable
28

1 license arises when, because of the reliance of the licensee, it
2 becomes inequitable to allow the landowner to revoke the license.

3 As discussed above, there is no genuine issue of fact, the
4 1971 Agreement did not create an express easement in favor of the
5 plaintiff.

6 The plaintiff argues it has an easement by estoppel. The
7 main case that the plaintiff cites in support of its assertion is
8 an implied easement case and completely inapposite to the present
9 situation. See George v. Goshgarian, 189 Cal. Rptr. 94 (Ct. App.
10 1983). George involved an implied easement that arose by virtue
11 of the acts of the original owner of property who later
12 subdivided the property reserving some easements. This type of
13 quasi-easement or implied easement is limited to the specific
14 provisions of California Civil Code § 1104. An easement will be
15 implied in favor of the grantee where a person subdivides his
16 property but prior to subdivision had obviously and permanently
17 used a portion of the property retained for the benefit of the
18 property transferred. In the present case, no property was
19 subdivided with a portion of it being retained by the original
20 owner.

21 The plaintiff could have attempted to argue that it has the
22 equivalent of an easement by virtue of a license becoming
23 irrevocable. A license does not fall under the statute of frauds
24 and therefore may be oral. A license will become irrevocable
25 "[w]here a licensee, in reliance on a parol license, has expended
26 money in improvements so that its termination would be
27 inequitable" 3 Witkins, Summary of California Law, Real
28

1 Property, § 382. However, the plaintiff does not make this
2 argument. Therefore the plaintiff has not raised a genuine issue
3 of fact concerning the existence of an irrevocable license and
4 has not carried its burden in opposing this motion for summary
5 judgment.

6 Moreover, even if the plaintiff had argued there was an
7 irrevocable license, it does not appear that a genuine issue of
8 fact exists that would prevent summary judgment in favor of the
9 defendant. The plaintiff was allowed to enter Creekside to make
10 repairs to the cable system for which the defendants were
11 charged. However, when the plaintiff expressly proposed that it
12 would replace the entire cable system at Creekside if it could
13 own that system and receive an easement, the offer was rejected.
14 Given this express denial of a request for an easement, it does
15 not appear that the plaintiff could argue it relied on any of the
16 defendants' actions and that denying it an easement to enter
17 Creekside and construct a cable system is inequitable.

18 Furthermore, to the extent the plaintiff attempted to argue
19 that an easement was created prior to when the defendants
20 purchased the property and recorded their deed, these arguments
21 are unavailing. No such easement was recorded and the plaintiff
22 has presented no evidence to raise a genuine issue of fact that
23 the defendants should have known of some other acts creating an
24 easement in favor of the plaintiff.

25 Therefore, the plaintiff has presented no evidence that
26 raises a genuine issue that an express easement, an implied
27 easement, or an easement by virtue of a revocable license exists.
28

1 Thus the defendants cannot be liable for breach of an easement.
2 The Court therefore grants summary judgment in favor of the
3 defendants on the plaintiff's fourth claim for relief.
4

5 F. Claim Five: Interference with Prospective Economic
6 Advantage

7 The plaintiff asserts that the defendants' actions
8 interfered with its ability to contract with residents of
9 Creekside to sell them premium cable services. In its complaint,
10 the plaintiff asserts that the defendants interfered with its
11 relations with those residents not currently subscribing to
12 premium channels but who might subscribe in the future. In its
13 opposition to this motion, the plaintiff argues that the
14 residents to whom it currently sells premium channels supply the
15 current economic relationship element of this tort.

16 Under California law, this tort requires: (1) an economic
17 relationship between the plaintiff and some third person
18 containing the probability of some future economic benefit to the
19 plaintiff; (2) knowledge by the defendant of the existence of the
20 relationship; (3) intentional acts on the part of the defendant
21 designed to disrupt the relationship; (4) actual disruption of
22 the relationship; and (5) damages to the plaintiff proximately
23 caused by the acts of the defendant. Blank v. Kirwan, 216 Cal.
24 Rptr. 718, 730 (1985). In Blank, the court held the plaintiff
25 could not state a claim for relief based on the expectancy of
26 economic relations with a group of unnamed patrons when the city
27 had broad discretion to grant or deny the plaintiff a license to
28

1 do business. General expectations of relations with potential
2 customers do not constitute economic relationships sufficient for
3 protection. In re Super Premium Ice Cream Distribution Antitrust
4 Litig., 691 F.Supp. 1262, 1270 (N.D. Cal. 1988).

5 In the present case the plaintiff cannot meet the
6 requirements of an economic relationship with expectancies of
7 future economic benefits. The fact that the plaintiff has
8 current economic relations with some residents of Creekside does
9 not support its claim for interference with prospective economic
10 advantage with those residents to whom it currently does not sell
11 premium channels. The interference must occur within the current
12 economic relationship.

13 Furthermore, the plaintiff can have no expectancy of
14 economic benefit from relationships with the Creekside residents
15 if it has no right of access. Just as the fact that the city had
16 the authority to deny a license to the plaintiff in Blank
17 destroyed the requisite "expectancy", the defendants' right to
18 exclude Sonic from Creekside also destroys any expectancy.

19 As discussed above, the plaintiff has no right of access to
20 Creekside.

21 Therefore, the Court grants summary judgment in favor of the
22 defendants on the plaintiff's fifth claim.

23
24 G. Claim Six: Interference with Contract

25 "The tort of interference with contract 'is merely a species
26 of the broader tort of interference with prospective economic
27 advantage.'" 4 Witkins, Summary of California Law, Torts § 392
28

1 (1984 Supp.) (citing Buckaloo v. Johnson, 122 Cal. Rptr. 745
2 (1975)).

3 Thus, because, as stated above, the plaintiff had no right
4 of access to Creekside to contract with the residents, this claim
5 must also fail.

6 Therefore, the Court grants summary judgment in favor of the
7 defendants on the plaintiff's sixth claim.

8
9 H. Claim Seven: Unfair Competition

10 The defendants argue that the plaintiff has presented no
11 evidence of unfair or unlawful action to support this claim. The
12 plaintiff, rather than presenting any evidence to raise a triable
13 issue of fact as to whether the defendants' actions constituted
14 unfair competition, argues that the defendants do not cite law or
15 facts to show that they have acted fairly and lawfully.

16 On a motion for summary judgment, the moving party need not
17 disprove the claims upon which the nonmoving party bears the
18 burden of proof at trial. Celotex, 477 U.S. at 325. The moving
19 party carries its burden if it points to the absence of evidence
20 to support the nonmoving party's claims. Id. The burden then
21 lies with the nonmoving party to present at least some evidence
22 to raise a triable issue of fact. Fed. R. Civ. P. Rule 56(e).

23 The plaintiff bears the burden of proving unfair
24 competition. The plaintiff, in its opposition, has pointed to no
25 evidence tending to prove the defendants in any way acted
26 unlawfully or unfairly. Therefore, the plaintiff has failed to
27 meet its burden on this motion and the defendants are entitled to
28

1 summary judgement.

2 Therefore, the Court grants summary judgment in favor of the
3 defendants on the plaintiff's seventh claim.

4
5 I. Claim Eight: First Amendment

6 The plaintiff claims it is entitled to relief under 28
7 U.S.C. § 1983 for the defendants' violation of its First
8 Amendment rights. In order to prevail on a claim under 42 U.S.C.
9 § 1983 the plaintiff must show that the defendants (1) acted
10 under color of state law and (2) deprived the plaintiff of a
11 right secured by the Constitution of the United States. Flagg
12 Bros., Inc. v. Brooks, 98 S.Ct. 1729, 1733 (1979).

13 First, the plaintiff must present some evidence that the
14 defendants were acting under color of state law. The Supreme
15 Court has explained:

16 The traditional definition of acting under color of
17 state law requires that the defendant have exercised
18 power "possessed by virtue of state law and made
19 possible only because the wrongdoer is clothed with the
20 authority of state law" It is firmly established
21 that a defendant ... acts under color of state law when
he abuses the position given to him by the State....
Thus, generally, a public employee acts under color of
state law while acting in his official capacity or
while exercising his responsibilities pursuant to state
law.

22 West v. Atkins, 108 S. Ct. 2250, 2255-56 (1988) (citations
23 omitted). None of the defendants in the present action are
24 public employees.

25 A private individual may act "under color of law" where
26 there is "significant state involvement" in the action.

27 See Lopez v. Dept. of Health Services, 939 F.2d 881, 883 (9th
28

1 Cir. 1991) (quoting Howerton v. Gabica, 708 F.2d 380, 382 (9th
2 Cir. 1983)). The Supreme Court has articulated a number of tests
3 to determine when the state's involvement is "significant." Id.
4 Under the governmental nexus test, a private party acts under
5 color of law if "there is a sufficiently closes nexus between the
6 State and the challenged action of the regulated entity so that
7 the action of the latter may be treated as that of the state
8 itself." Id. (quoting Jackson v. Metropolitan Edison Co., 95
9 S.Ct. 449, 453 (1974)). Under the joint action test, a private
10 party acts under color of law if "he is a willful participant in
11 joint action with the State or its agents." Id. (quoting Dennis
12 v. Sparks, 101 S.Ct. 183, 186 (1980)).

13 In the present case, none of the defendants are involved in
14 joint action with the state. Furthermore, there is no close
15 nexus between the defendants' actions in excluding Sonic from
16 Creekside and any governmental involvement through regulation of
17 Creekside. Thus, the plaintiff clearly cannot show the
18 defendants acted under color of state law.

19 Even if the plaintiff could show that the defendants'
20 actions were taken under color of law the plaintiff could not
21 prove a violation of the plaintiff's First Amendment rights. A
22 violation of the First Amendment right to freedom of speech
23 requires an improper restriction on speech by a state actor.
24 Hudgens v. N.L.R.B., 96 S.Ct. 1029, 1033 (1976). The First
25 Amendment only protects citizens from state action, not from
26 "action by the owner of private property used nondiscriminatorily
27 for private purposes only." Lloyd Corp., Ltd. v. Tanner, 92
28

1 S.Ct. 2219, 2228 (1972).

2 In the present case the defendants are all private actors.
3 A private actor may be deemed to act as the state for purposes of
4 the Constitution in two circumstances: (1) if there is
5 significant state involvement in the actions of the private
6 actor, or (2) if it is performing a traditionally exclusively
7 public function.

8 The plaintiff argues that there is state action because the
9 state regulates mobile home parks by issuing licenses and
10 requiring inspections. However, this is insufficient to raise a
11 genuine issue of fact as to whether the defendants are state
12 actors. There is no indication that this regulation is
13 extensive. Even if it were, extensive regulation alone does not
14 create state action. San Francisco Arts & Athletics v. Olympic
15 Cmtee., 107 S.Ct. 2971, 2985 (1987). State action generally
16 requires that the state have some coercive power over the private
17 actor or exert significant encouragement. San Francisco Arts &
18 Athletics, 107 S.Ct. at 2986. In other words, the state must
19 somehow have caused the private actor to take the action that
20 deprived the plaintiff of its constitutional right. In the
21 present situation, the state regulation of Creekside does not
22 encompass the provision of cable services. Thus, the defendants'
23 exclusion of the plaintiff cannot be considered state action.

24 The plaintiff also argues that the defendants should be
25 considered state actors under the company-town line of cases that
26
27
28

1 follow Marsh v. Alabama, 66 S.Ct. 276 (1946).¹ Those cases
2 reason that when a private party takes on a traditionally
3 exclusively public function, that private individual may be
4 deemed a state actor for purposes of the Constitution. However,
5 Creekside does not approach the level of a company-town such as
6 the one involved in Marsh. Creekside is strictly a residential
7 community. It does not have a business center for retailers and
8 service providers. Providing a residential community is not a
9 function that is traditionally exclusively reserved to the
10 public.

11 Finally, even if the plaintiff could show state action, the
12 plaintiff would still have to prove some improper limit on its
13 First Amendment rights. However, the plaintiff is claiming a
14 right to enter private property. There is no general right of
15 access to private property for speech purposes. See Hudgens, 96
16 S.Ct. at 1033; Lloyd Corp., Ltd., 92 S.Ct. at 2228. Private
17 property is not a public forum. It may become a public forum in
18 certain circumstances. However, the plaintiff has presented no
19 evidence that that has occurred in the present case.

20 Therefore, the Court grants summary judgment in favor of the
21 defendants on the plaintiff's eighth claim.

22
23 ¹ The plaintiff, because it relied on a citation rather
24 than reading the actual case, cited Laguna Publishing Co v. Golden
25 Rain Foundation, 182 Cal. Rptr. 813 (Ct. App. 1982) in support of
26 its position that Creekside should be considered a company-town.
27 However, the court in that case found the opposite of the
28 proposition for which the plaintiff cites it. The court held that
a residential development that was much more extensive than
Creekside was not a company-town for purposes of the First
Amendment.

1 III. Plaintiff's Motion for Partial Summary Judgment

2
3 The plaintiff argues it is entitled to summary judgment on
4 its first claim for relief. For the reasons stated above
5 supporting summary judgment in favor of the defendants on the
6 plaintiff's first claim for relief, the Court denies this motion.

7
8 Conclusion

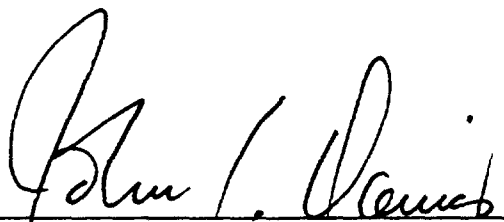
9
10 The Court concludes that there will be no prejudice to the
11 defendants from granting the plaintiff's motion to amend. The
12 Court therefore grants the plaintiff's motion to amend and orders
13 the proposed second amended complaint filed.

14 The Court further concludes that the defendants have shown
15 there are no genuine issues of material fact and they are
16 entitled to judgment as a matter of law. The Court therefore
17 grants summary judgment in favor of the defendants.

18 The Court concludes that the plaintiff's motion for partial
19 summary judgment must be denied for the reasons defendants'
20 motion for summary judgment on the first claim is granted. The
21 Court therefore denies the plaintiff's motion for partial summary
22 judgment.

23 IT IS SO ORDERED.

24
25 Dated: JAN 18 1994

26
27 
28 JOHN G. DAVIES
United States District Judge

CV 92-6577-JGD(Ex)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONTINENTAL CABLEVISION OF
MICHIGAN, INC., d/b/a/
Continental Cablevision of
Lansing, Michigan Corporation,
and DAVID SHABERG.

Plaintiffs.

v.

EDWARD ROSE REALTY, INC., a
Michigan Corporation, and
EDWARD ROSE ASSOCIATES, INC.,
d/b/a FLINT BUILDING COMPANY,
INC., a Michigan Corporation,

L 87-17 CA 5

Defendants.

EDWARD ROSE REALTY, INC., a
Michigan Corporation, and
EDWARD ROSE ASSOCIATES, INC.,
d/b/a FLINT BUILDING COMPANY,
INC., a Michigan Corporation,
and TRAPPERS COVE APARTMENTS,
PHASE III, a Michigan Co-Part-
nership.

HON. ROBERT HOLMES BELL

Counterplaintiffs.

v.

CONTINENTAL CABLEVISION OF
MICHIGAN, INC., d/b/a/
Continental Cablevision of
Lansing, Michigan Corporation.

Counterdefendants.

OPINION

Before this Court is defendants' motion to dismiss plain-
tiffs' entire complaint because the complaint states no

state claims upon which relief can be granted or because this Court lacks subject matter jurisdiction. Plaintiffs seek a declaratory judgment that defendants' intended replacement of plaintiffs' cable television (CATV) service with their own satellite master antenna television service (SMATV) at two defendant owned apartment complexes will violate a City of Lansing ordinance, the State of Michigan Constitution, the First Amendment to the United States Constitution, the Cable Communications Act of 1984, and the Michigan Consumer Protection Act. Plaintiffs also seek a preliminary and permanent injunction enjoining defendants from interrupting plaintiffs' present cable television service.

BACKGROUND

Continental Cablevision of Michigan, Inc. (Continental) is a cable television company operating in Lansing, Michigan as a grantee under a franchise issued by the City of Lansing. Edward Rose Realty, Inc. and Edward Rose Associates, Inc. (Rose) are real estate companies and own two apartment complexes, Waverly Park and Trappers Cove. Flint Building Company (FBC), predecessor in interest to Rose, contracted with Continental in August 1980 giving Continental the exclusive right to install, own, maintain, and operate CATV service equipment for seven years at FBC's apartment complexes. The contract also provided for automatic one year renewals unless notice to quit was provided three months prior to term. Upon termination of the contract the

agreement alternatively required Continental to remove its equipment within ninety days, permitted Rose to remove it after ninety days, or provided for Rose to buy the equipment at a fair price.

On December 23, 1986, Rose notified Continental that Rose would terminate the contract on June 30, 1987. The parties extended the termination to September 30, 1987. On June 1, 1987, the Lansing City Council amended its municipal cable television regulations by passing City of Lansing Municipal Ordinance 753, which provides:

- (A) For purposes of this section, dwelling shall include but not be limited to buildings, apartments, townhouses, cooperatives, condominiums or mobile home parks.
- (B) No owner, agent or representative of the owner of any dwelling shall directly or indirectly prohibit any resident of such dwelling from receiving cable communication installation, maintenance and services from a Grantee operating under a valid franchise issued by the City.
- (C) If the owner, agent or representative of the owner of any dwellings refuses directly or indirectly to permit any resident of such building from receiving cable communication services installation, maintenance and services from the Grantee operating under a valid franchise issued by the City, the City upon request of the Grantee may commence condemnation proceedings in accordance with applicable law.
- (E) Neither the owner, agent or representative of the owner of dwellings shall penalize, charge, or surcharge a tenant or resident or forfeit or threaten to forfeit any right of such tenant or resident who request or receives cable communication services from the Company operating under a valid and existing cable communications franchise issued by the City.

As stated amended Ordinance 753, § (B), forbids owners of a dwelling from directly or indirectly prohibiting its tenants from receiving cable television services from a validly franchised grantee. Ordinance 753, § (C) also provides a remedy where an owner refuses to permit a tenant from receiving franchised cable services.

On June 11, 1987, Continental requested the City Council to commence condemnation proceedings against Rose. The City Council responded with Resolution 446 on August 31, 1987, declaring cable television service to Trappers Cove and Waverly Park "to be in the public interest, and to constitute both a public use and a public purpose." It further authorized appraisal and purchase of required space at the apartment complexes as consistent with the Ordinance and applicable condemnation law.

Meanwhile, on July 22, 1987, Continental sought a preliminary injunction in the Circuit Court for the County of Ingham, Michigan to enjoin Rose from interfering with Continental's cable service to the apartment complexes. Prior to any hearing on the preliminary injunction in state court, Rose removed the matter to this Court on August 20, 1987. Plaintiffs did not request remand. On September 23, 1987, this Court heard and granted plaintiffs' application for a preliminary injunction.

Plaintiffs' state their complaint in four counts requesting a declaratory judgment and preliminary and permanent injunctions enjoining Rose from interrupting Continental's cable service to the apartment complexes. In Count I plaintiffs allege that:

Ordinance 753 and the Cable Communications Policy Act of 1984, Pub. L. 98-549, 47 U.S.C. §§ 521 et seq. (Cable Act) affords plaintiffs a right of access to provide cable service and prohibit defendants from interrupting Continental's cable service to the apartment complexes. Plaintiffs further allege that they will suffer irreparable harm if Rose effects its intended substitution of SMATV service for Continental's cable service. Continental claims that it will lose property its ability to provide its duly franchised service. Shaberg will lose access to Continental's diverse information services including public access channels.

In Count II plaintiffs allege that the contract provision which alternatively require Continental to remove its equipment within ninety days after termination of the agreement or permit Rose to remove thereafter violates Ordinance 753. Again plaintiffs allege irreparable harm.

In Count III plaintiffs allege that purposes and policies of the First Amendment to the United States Constitution, Art. 1, § 5 of the State of Michigan Constitution, and the Cable Act entitle tenants at the apartment complexes to access to Continental's cable services without interference or interrupt from Rose.

In Count IV plaintiffs allege that Rose and FBC represented to tenants at the complexes that cable television services would be provided, that plaintiff Shaberg and other tenants relied on that representation, and that the anticipated substitution of defendants' differing SMATV service for Continental's CATV

service offering public access channels would constitute an unfair trade practice violating §§ 3(1)(c), (s), and (y) of the Michigan Consumer's Protection Act (MCPA), MCL 445.903(3); MSA 19.418(3).

CLAIMS OF THE PARTIES

MOVANTS-DEFENDANTS

Rose claims that Ordinance 753 does not permit Continental a continued right of access to Rose's property absent valid eminent domain proceedings pursuant to applicable state law. Rose asserts that plaintiffs' request for a permanent injunction prohibiting Rose from interfering with Continental equipment and service is effectively a constructive condemnation without the procedural safeguards guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Rose contends that Continental seeks to deprive Rose of its present enjoyment of Rose's own property, even though Continental currently has no private contractual rights of access and the City of Lansing has not yet taken Rose's property under its supposed powers of eminent domain. Rose characterizes Continental's request for a permanent injunction as a pre-condemnation ploy under the guise of the law to take private property without just compensation.

Moreover, Rose contends that plaintiffs do not have a constitutional defense to Rose's enforcement of its contractual rights to remove Continental from the apartment complexes because plaintiffs cannot allege any governmental action implicating any

state or federal constitutional rights in Rose's removal of Continental. Additionally, Rose argues that Continental does not have a federal statutory right of access to Rose's property because the Cable Act does not include a federal mandatory access provision. Rose also contends that the Cable Act does not create a private right of action upon which Continental itself can sue to gain access, and concludes that Continental must rely on the City of Lansing to conduct eminent domain proceedings in conformity with Ordinance 753.

Furthermore, plaintiffs' allegation that Rose's anticipated substitution of its SMATV service for Continental's cable service constitutes an unfair trade practice and violates MCPA lacks specificity and is factually deficient to state a claim. Rose suggests that this allegation was merely appended as a transparent attempt to invoke the injunctive remedy provisions of MCL § 445.911; MSA § 19.418.

MOVEES-PLAINTIFFS

Plaintiffs argue that Ordinance 753 is presumptively constitutional and must be accorded valid authority. Further, Plaintiffs maintain that Ordinance 753, § (B), plainly forbids a dwelling owner from directly or indirectly prohibiting a tenant from receiving cable services from a validly franchised grantee. Plaintiffs represent that they simply seek to enjoin Rose from violating the plain meaning of Ordinance 753, § (B), pending completion of the condemnation proceedings as required in § (C)

of Ordinance 753 when a dwelling owner refuses to permit its tenant to receive cable services from a validly franchised grantee. Plaintiffs indicate that the eminent domain proceedings have begun. Moreover, plaintiffs contend that the Ordinance comports with the United States Supreme Court's decision in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), and consequently does not offend the taking clause under the Fifth Amendment or the Due Process clause of the Fourteenth Amendment. Plaintiffs also criticize Rose's interpretation of Ordinance 753 as illogical in that Rose argues that it may violate the clear dictates of § (B) until the City completes condemnation under § (C).

Further, plaintiffs claim that Rose will violate their First Amendment free speech rights by terminating Continental's cable service at the apartment complexes. While recognizing that First Amendment free speech protections properly apply to restrain overreaching state action, plaintiffs contend that under certain circumstances such protections extend to conduct of private individuals, specifically noting the "company town" and "public forum" exceptions. Plaintiffs argue that they should be allowed to factually discover and assess the degree to which Rose's apartment complexes qualifies under this exception before this Court can legitimately dismisses this claim.

Plaintiffs also contend that the Cable Act entitles Continental access to dedicated utility easements on rose's property for their CATV installations.

Moreover, plaintiffs assert that their MCPA claim should not be dismissed as frivolous. Plaintiffs maintain that Rose represented that tenants would have cable television service and that tenants, including plaintiff Shaberg, relied on that representation in leasing apartments from Rose. Since Rose's proposed SMATV services qualitatively differ from CATV, Rose will violate the MCPA by having represented to consumers benefits that Rose will in fact not provide.

ANALYSIS

Ordinance 753

Plaintiffs request this Court to declare that Rose's intended removal of Continental from the apartment complexes and the substitution of Rose's SMATV for Continental's CATV would violate Ordinance 753, § (B). This Court recognizes that § (B) plainly states:

No owner, agent or representative of the owner of any dwelling shall directly or indirectly prohibit any resident of such dwelling from receiving cable communication installation, maintenance and services from a Grantee operating under a valid franchise issued by the City.

If this section is read in isolation from the other sections of the amended ordinance, it would apparently prohibit Rose from interfering with Continental's provision of cable service. However, as a matter of statutory construction this Court notes the general maxim that statutes are to be construed as a whole and that each part is accorded its meaning in relation to the statute's other parts. Richard v. United States, 369 U.S. :

(1962). See 2A Sutherland, Statutory Construction, § 46.05, 90-32 (4th ed. 1984). Accordingly this Court notes that § (C) provides:

If the owner, agent or representative of the owner of any dwellings refuses directly or indirectly to permit any resident of such building from receiving cable communication services installation, maintenance and services from the Grantee operating under a valid franchise issued by the City, the City upon request of the Grantee may commence condemnation proceedings in accordance with applicable law.

Clearly, the ordinance recognizes and contemplates the possibility that a dwelling owner might "refuse to directly or indirectly permit" a resident from receiving cable services. The ordinance also specifically designates what the drafters apparently considered to be the appropriate remedy for a frustrated grantee under such circumstances. Facially, therefore, the legislative intent appears to require a stymied grantee to proceed under the scheme created by the ordinance and request the city to begin condemnation proceedings. This procedure, of course, makes imminently good sense. For through a proper eminent domain proceeding a court will assess the validity of the competing claims and resolve disputes regarding the alleged prohibition of cable services, and determine the legal, financial, real, personal, and societal interests of the parties and the public.

Moreover, the ordinance's provision for eminent domain proceedings comports with the due process and Fifth Amendment safeguards required in governmentally sanctioned takings of private property. Construing § (B) of the ordinance as a mandatory access provision independent of § (C), as plaintiffs

thereby procuring the property and securing for them a legal right of access. This analysis again dovetails §§ (B) and (C), reading both as part of an integrated whole.

Contract Rights

Rose permitted Continental to occupy Rose's property at the apartment complexes with its cable equipment pursuant to their mutual agreement. Pursuant to that same agreement Rose seeks to eject Continental from Rose's property. This Court characterizes Rose's free exercise of its contract rights to eject Continental as an event precipitating application of § (C), and not as an event in the nature of a violation of § (B). Therefore, Rose's exercise of its contract right to eject Continental is merely an occasion for Continental to request the City of Lansing to commence condemnation proceedings as provided in Ordinance 753. This interpretation is consistent with the absence of language in the ordinance specifically and affirmatively granting to Continental a mandatory right of access. Continental would simply presume to occupy Rose's property based upon the inference that § (B) grants to Continental an implicit right of access. This Court believes that the proper interpretation of Ordinance 753 strictly construes §§ (B) and (C) in tandem as an integrated whole according to their literal terms giving reasonable effect to each integral part. Thus, this Court recognizes that since § (B) does not textually provide a substantive right of access to Rose's property, § (C) is logically and legally antecedent to

Continental's occupancy of Rose's property because § (C) potentially provides Continental with a substantive right of access and occupancy through condemnation proceedings. This Court determines that this is the most reasonable construction of §§ (B) and (C) where: (1) the due process safeguards of the Fifth Amendment against a governmentally sanctioned taking without just compensation are implicated, (2) the ordinance does not textually provide an explicit affirmative mandatory access, (3) the ordinance does textually and specifically provide for a condemnation proceedings, (4) a dwelling owner arguably directly or indirectly prohibits CATV service, and (5) the CATV service provider relies on the ordinance for an inchoate right of access and occupancy.

First Amendment

This Court proceeds acknowledging that plaintiffs advance their First Amendment arguments in competition with defendants' First and Fifth Amendments rights. Further, this Court recognizes that both state and federal constitutions guarantee free speech against abridgment by governmental conduct. See Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Hudgens v. NLRB, 424 U.S. 507, 518 (1976). Lloyd Corp. v. Tanner, 407 U.S. 539 (1972). Woodland v. Michigan Citizens Lobby, 423 Mich. 188, 378 N.W. 2d 337 (1985). To prevail on their claim plaintiffs must prove that Rose (1) deprived plaintiffs of their First Amendment rights, and (2) did so under color of state law. See Flagg Bros., Jackson v.

Metropolitan Edison Co., 419 U.S. 345, 359-60 (1974). Adickes v. S.H. Kress & Co., 398 U.S. 144, 153, 170 (1970).

Although the First Amendment properly applies to governmental action, this Court recognizes that First Amendment protections may apply to certain private conduct if the private conduct possesses characteristics that: (1) create a sybiotic relationship between it and governmental activity, (2) establish a sufficiently close nexus between it and some relevant governmental activity, or (3) assume a full spectrum of traditionally necessary, exclusive, and quintessentially public functions. See Newsome v. Vanderbilt University, 653 F.2d 1100, 1114 (6th Cir. 1981).

No issue of material fact exists that Rose and any governmental agency maintained a sybiotic relationship. No financial, administrative, or other interdependency exists. Further, nothing before this Court suggests that a close nexus links Rose and any governmental authority. Moreover, Rose has not assumed any public function. Rose, as a private entity, merely owns apartment complexes and does not provide and perform traditionally exclusive governmental services and functions. Plaintiffs' attempt to qualify Rose's ownership under the public function analysis fails. In Marsh v. State of Alabama, 326 U.S. 501 (1946), and its progeny the Court articulated the public function analysis in the terms and context of a company town. the company town analysis was premised upon a private actor providing and performing a full spectrum of traditionally exclusive and